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OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., *et al.*,
Petitioners,

v.

GTE SYLVANIA INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

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The Motor Vehicle Manufacturers Association (MVMA) respectfully moves the Court for leave to file the attached brief as *amicus curiae* in this case. Counsel for respondent has consented to the filing of the attached brief. The consent of counsel for petitioners was requested but refused.

The interest of MVMA as *amicus curiae* is set forth at pages 1-2 of the attached brief. The brief describes

the benefits of locational franchising to both the manufacturer and the consumer and explains the economic rationale for certain types of vertical relationships. The dealer "location clause" in common use in the motor vehicle industry is used as an example of how business relationships reflect this economic rationale. These matters are not fully discussed in the respondent's brief.

Respectfully submitted,

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BRIEF FOR MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Motor Vehicle Manufacturers Association (MVMA) is a voluntary, nonprofit membership association composed of companies engaged in the production of motor vehicles in the United States. MVMA has often represented the interests of its member companies in both administrative and judicial proceedings.

This case raises important issues about the lawfulness under the Sherman Act of dealer location clauses,

and of the franchise distribution systems that depend on such clauses. MVMA's member companies have a direct and vital interest in the resolution of those issues. Motor vehicle manufacturers distribute their products through independent franchised dealers. Those dealers are franchised to sell the manufacturer's vehicles from specified locations to any customer, wherever he may live or have his place of business. The manufacturer's consent is required for them to change or add selling locations. The dealers are typically not granted "exclusive franchises": The manufacturer is free to locate additional dealers wherever it thinks a new outlet will help it to compete effectively for sales. In fact, automobile manufacturers generally have a number of dealers in every major metropolitan area, and those dealers typically sell throughout the area and beyond.

INTRODUCTION AND SUMMARY

Motor vehicles are complex, costly, mobile, and long-lasting products which require sophisticated pre- and post-sale servicing. The manufacturer's relationship and responsibility to the consumer begin before any purchase is consummated and last for the life of the car. Consumers want and need to be informed before purchase of the characteristics and performance of competing vehicles in order to assure themselves that the financially important choices they are making suit their needs. After the purchase, the consumer wants to have reliable and convenient service available. The manufacturer strives to meet these consumer needs in order to maintain consumer goodwill and thus achieve sales success.

In recent years, the manufacturer's competitive interest in meeting consumer needs has been reinforced by an expanding range of statutory obligations to consumers. Both emission controls and safety devices on a vehicle must meet rigid federal standards. Safety and

emission control defects discovered after sale must be corrected at the manufacturer's expense. In a very real sense, the manufacturer is subject to continuing economic risks that require him to arrange for competent, careful servicing by franchised dealers located conveniently to the owners of the vehicles and equipped with the facilities to discharge this function.

These features of the motor vehicle industry are the basic business realities that make a franchising system with locational restrictions essential.

This *amicus* brief also sets forth the underlying economic principles which support the assertion that the use by manufacturers of vertical restraints on the locations of dealers may be beneficial to competition and consumer welfare. A manufacturer and the consumers of its product want the same thing from a distributional system: maximum effectiveness at minimum cost. Every manufacturer has an economic interest in having its product marketed effectively at the lowest possible cost. The consumer wants a convenient place to buy the product, enough information to make an intelligent choice, and reliable post-sale servicing—all at the lowest possible price. If a dealer incurs unnecessary costs or makes excessive profits, both manufacturer and consumer suffer. The manufacturer loses sales and profits, and the consumer pays higher prices and gets reduced services.

Part I of this brief examines the above propositions in detail and explains the consequences which flow from them. For the motor vehicle industry, a franchise system specifying each dealer's selling location is the most effective and competitive method of distributing and servicing motor vehicles.

Part II of the brief examines prior decisions on the lawfulness of location clauses under the Sherman Act. Such clauses have uniformly been upheld as reasonable, ancillary restraints needed to make locational franchis-

ing work. Every federal court that has confronted the issue has determined that the *Schwinn per se* language has no applicability to this type of vertical arrangement. Petitioners ask this Court to overturn these prior decisions by extending the *Schwinn per se* language to cover location clauses. But they do not and cannot support this plea with reasoned analysis.

If the broadest language of the *Schwinn* opinion is viewed by this Court as being inconsistent with the decisions upholding location clauses under the rule of reason, there is considerable support for a reexamination of *Schwinn* itself. Part III of this brief examines the opinions in *Schwinn* and *White Motor*, and the judicial and scholarly authorities that have strongly criticized the *Schwinn* rationale.

ARGUMENT

I. COMPETITIVE MARKET FORCES MAY REQUIRE A MANUFACTURER TO BE SELECTIVE IN THE NUMBER AND LOCATION OF ITS DISTRIBUTION OUTLETS.

Any manufacturer of a consumer product wants to find and maintain the most efficient, competitively effective method of distributing its product to consumers. This interest coincides with that of the consumer, who naturally wishes to have a choice of products offered to him at the least possible cost consistent with his need for purchasing convenience, quality and convenience of service, and other requisites of effective retail distribution. A manufacturer often finds that the most competitively successful, least costly method of distribution is to sell the product to selected independent ("franchised") dealers operating at specified locations.

The choice of distribution through independent franchised dealers makes particular competitive sense for manufacturers of complex, expensive products requiring

substantial capital investment at the retail level, sophisticated pre- and post-sale servicing, and the communication of accurate operating information to the user at the time of sale and over the lifetime of the product. That has been the unanimous choice, based on experience, of motor vehicle manufacturing firms—whether large or small, domestic or foreign. When the franchising choice is made, and selected independent dealers are established at specified locations, the manufacturer's reasons for so choosing—and the economic results of its choice—are the natural result of market forces and are typically pro-competitive and pro-consumer. If manufacturers were forbidden to select their dealers and specify their locations, and were compelled instead to choose between forward vertical integration or sale to dealers free of any condition on the locations from which they resell to consumers, then major objectives of the Sherman Act—effective competition and consumer welfare—would be damaged, not enhanced.

A. A Manufacturer May Be Expected To Choose the Method of Distribution That Is Competitively Most Effective and Most Satisfies Consumers of Its Product.

Proper antitrust analysis of vertical marketing arrangements must begin with, and never lose sight of, the fundamental identity of manufacturer and consumer interests vis-à-vis intermediate links in the distribution chain.[1] Both manufacturer and consumer want com-

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[1] *See, e.g.*, Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 283, 287-88 (1975); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 403 (1966); *cf.* Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv. L. Rev. 1720, 1731-32, 1737 (1974).

The cited authors further argue that the identity of manufacturer and consumer interests extends to manufacturer-initiated

petitively effective, low-cost distribution; neither wants the intermediaries to receive monopoly profits or to incur unnecessary costs.

It is obvious that every manufacturer has a vital economic interest in finding the most efficient, most competitively effective way to distribute its product—that is, one that minimizes distribution costs. It should be equally obvious—but is sometimes forgotten—that the consumer wants the same thing. He, too, wants to be able to buy the product at a convenient location, with necessary information about the product provided before and at the time of sale and with reliable, convenient service, repair parts, and operating information provided after the sale—all at the lowest possible price. Monopoly conditions at any point in the distribution chain (wholesaler or retailer) benefit neither manufacturer nor consumer. Such conditions can only mean higher prices or inferior and less convenient services to the consumer and lower sales and profits for the manufacturer.[2]

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minimum resale price maintenance. The proposition is dubious, and such price-fixing is readily distinguishable from other distribution restraints, particularly limitations on the number of dealers. Among other things, minimum resale price maintenance is plainly against the interests of customers of all those outlets who would carry the product, and at a lower price, absent the restrai' Moreover, unlike limitations on the number of dealers or even territorial restrictions, minimum resale price maintenance cannot serve the purpose of promoting economies of scale in distribution; indeed, it promotes sales of low-volume, high-markup retailers at the expense of more efficient competitors. Accordingly, this Court need have no concern that upholding location clauses would in any way impair the validity of the *per se* rule against minimum resale price maintenance, and we explicitly disavow any such position in this brief.

[2] The manufacturer's dislike of monopoly conditions at the dealer (or wholesaler) level exists regardless of his own degree of market power. "The difference between the price at which the manufacturer sells to the dealer and the dealer's price to the consumer is the manufacturer's cost of distribution, and any seller (even a monopolist) wants to minimize his costs." Posner, *supra* note 1, at 283. For further discussion of this point, *see* p. 46 *infra*.

For these reasons, the manufacturer may normally be expected to benefit from the maximum feasible competition among its dealers, because that increases the sales of the manufacturer's product and prevents excessive dealer margins, thus enabling the manufacturer to compete more effectively with other manufacturers of the same product. Any presumption that a manufacturer would try to suppress intrabrand competition that actually brings about more efficient and effective distribution requires acceptance of the general proposition that manufacturers deliberately foster dealer monopolies at the expense of reduced sales and profits for themselves. That proposition has no logical or empirical basis and should not be the starting point for analysis of the legality of manufacturer-imposed conditions on the location from which the dealer sells the product to the ultimate consumer.

Why, then, do manufacturers sometimes decide to impose conditions on how their dealers sell their products to consumers? Many manufacturers do in fact choose to distribute their products through sales to a limited number of dealers (rather than to anyone willing to pay the manufacturer's price); and they also specify the locations at which the dealers may sell (rather than let them do business from whatever location they wish). The reason for their choice is that they have found such "franchising" systems to be the most efficient, most competitively effective way to distribute their products. Business experience with franchising, especially in the marketing of complex, expensive, long-lasting consumer products such as motor vehicles, demonstrates the advantages that may accrue to manufacturer and consumer alike from a system in which the manufacturer imposes certain responsibilities on dealers in their marketing and servicing activities. Moreover, a growing body of modern

economic thinking about vertical relationships [3] explains why these advantages exist and describes how barring a manufacturer's influence on the locations from which dealers sell its products would threaten consumer welfare.[4]

B. For Complex, Expensive Products Requiring Sophisticated Pre- and Post-Sale Servicing, Effective Competition May Be Best Promoted, and Consumers May Be Best Served, by a Limited Number of Dealers at Specified Locations.

1. *Distribution of Motor Vehicles Through Selected Dealers at Specified Locations Promotes Competition and Benefits Consumers.*

Distribution through franchised dealers has long been established in the motor vehicle industry. The largest and smallest manufacturers, both domestic and foreign, of most types of vehicles have each made the same independent competitive decision: they each choose to distribute their products through carefully selected dealers who do business at locations specified by the manufacturer.[5] The reasons derive largely from the nature of

[3] *See* Phillips, *Schwinn Rules and the "New Economics" of Vertical Relations*, 44 Antitrust L.J. 573, 574 (1975).

[4] We refer here, of course, to vertical marketing conditions that originate with the manufacturer and serve his interest in effective distribution. Conditions that are vertical in form may, on closer examination, occasionally turn out to be the result of a horizontal cartel among dealers, imposed on the manufacturer. As Mr. Justice Brennan pointed out, concurring in *White Motor Co.* v. *United States*, 372 U.S. 253, 267 (1963), such restraints should be treated as horizontal market divisions. *See* pp. 45-46 *infra*.

[5] Some bus manufacturers sell directly to users. The National Automobile Dealers Association, an independent organization comprised of dealers selling all makes of cars and trucks, estimates that as of year-end 1975 there were a total of 29,300 franchised new car dealers. NADA further estimates that of this 29,300, 18,900 handled domestic makes only, 5,600 handled both domestic and imported makes, and 4,800 handled imported makes only. NADA, *Franchised New Car & Truck Dealer Facts* 10 (1976 ed.).

cars and trucks as complex, costly, mobile products, which require large capital investment at the retail level, sophisticated pre- and post-sale servicing, and a continuous flow of accurate information to the consumer on how to operate and maintain his vehicle and on what the vehicle can and cannot be expected to do. A motor vehicle manufacturer whose distribution system fails to meet these requirements cannot succeed in the marketplace.

A motor vehicle purchaser requires much more than mere delivery of the machine itself. Before he buys, as he makes his purchasing decision among competing makes and models, he requires accurate information about the operating characteristics and service requirements of the available vehicles and the available optional equipment. The vehicle itself requires substantial preparation for use after its shipment from the factory.[6] The buyer knows that, after the sale, his vehicle will need regular, and maybe emergency, servicing by the dealer from whom he bought it or by another dealer at any place to which the buyer and vehicle might travel.

The vehicle's service requirements are not simply a matter of customer discretion and choice; they also di-

[6] For example, Paragraph 4(a) of the Standard Provisions of the Ford Sales and Services Agreement provides:

> "Predelivery Service. The Dealer shall perform or be responsible for the performance of such inspection, conditioning and repair of each VEHICLE before delivery as may be prescribed for such VEHICLE in the Company's applicable predelivery inspection and conditioning schedules furnished by the Company to the Dealer. The Dealer shall maintain or be responsible for the maintenance of adequate records of all predelivery inspection, conditioning and repair work performed by or for the Dealer."

Compare the concern of Schwinn that its bicycles be safely and properly assembled before placed in the consumer's hands (rather than being sold "in a carton"). *United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323, 337-38 (N.D. Ill. 1965), *rev'd on other grounds*, 388 U.S. 365 (1967).

rectly involve the manufacturer because of warranty representations and laws and because of the manufacturer's legal responsibilities with respect to safety and emission controls. Vehicle manufacturers are subject to an expensive and expanding range of legal obligations, not only to the dealers who are their immediate vendees, but also to the consumer (and even the consumer's family and guests) with whom they have no contractual relationship. Vehicle manufacturers are required to meet safety standards, to advise vehicle operators if safety defects are found at any time after sale, and to take corrective recall and repair measures at their own expense.[7] They have similar duties with respect to emission controls.[8] Makers of television sets and other electronic products have similar responsibilities for radiation control.[9] All makers of consumer products have safety responsibilities under the Consumer Product Safety Act [10] and obligations with respect to warranty representations under the Consumer Product Warranties Act.[11] Under these laws, all such manufacturers continue to bear very substantial economic risks of loss throughout the entire period that their products are used by consumers.[12]

Since most manufacturers do not sell directly to consumers, they must delegate part of the tasks of maintaining consumer goodwill and of meeting the legal duties they owe consumers to the dealers who deal with consumers directly. They must be able to ensure that the

[7] *See* 15 U.S.C. § 1391 *et seq.* (National Traffic and Motor Vehicle Safety Act).

[8] *See* 42 U.S.C. § 1857 *et seq.* (Clean Air Act).

[9] *See* 42 U.S.C. § 263b *et seq.* (Radiation Control for Health and Safety Act).

[10] 15 U.S.C. § 2051 *et seq.*

[11] 15 U.S.C. § 2301 *et seq.*

[12] *See also* Part III-C *infra*.

dealers will do their part in performing these tasks, and that they will be suitably located and equipped to discharge this function. Vehicle manufacturers achieve this by establishing a network of carefully selected dealers at specified locations.

The manufacturer tries to choose and support competent dealers of efficient size, on whom consumers can safely rely and whose businesses will be stable enough to allow a continuous relationship with the customer. By prescribing the location of each dealer's facilities, the manufacturer can ensure that they are convenient to buyers and can achieve sufficient geographical coverage to reassure buyers that they will find adequate service and repair parts when they travel.[13]

To achieve these benefits, the manufacturer, the individual dealers, and the consumer all put a heavy stake in the dealership system. The manufacturer must help to train the dealer's sales and service personnel, especially with respect to product innovations that continually create new information, training, and service requirements, and also in some cases provide needed capital.[14] The dealers

[13] Competent dealers, expert in selling and servicing the manufacturer's products, also provide a continuous source of reliable information to the manufacturer about consumer needs, service problems, and defects in the product. The manufacturer can act on that information by making competitive product improvements. *Cf. Robertson Rock Bit Co.* v. *Hughes Tool Co.*, 176 F.2d 783, 785 (5th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950).

[14] The preamble to the Ford Sales and Service Agreement provides in pertinent part:

> "To assist its dealers in these responsibilities, the Company establishes and periodically updates standards of operation and planning guides based on its experience and current conditions. It also offers sales and service training courses, advice as to facilities, counseling in the various phases of dealership operations and, through other agreements and the activities of its affiliates, assistance in financing, new and used vehicle merchandising, parts and service merchandising, leas-

must make large capital investments in facilities, equipment, and parts and develop the expertise needed for both pre- and post-sale servicing.[15] The consumer relies heavily on the competence of the dealer who sells him this costly and complex piece of machinery and on the likelihood that the dealership will still be there to provide continuing information and service when the vehicle needs warranty work and other servicing.

If these "investments" are to pay off for all concerned, there must be the optimum number of dealers at the optimum locations. If dealers are too few in number or too widely spaced, the results will be lost sales and the unavailability of adequate service. If they are too many in number or too closely spaced, the results will be inadequate sales potentials, skimping on point-of-sale services, and a cycle of dealer failures and changing locations. This will increase consumer costs, harm consumer confidence in the continuous availability of quality service, and reduce the manufacturer's ability to compete in satisfying consumer expectations.

These benefits of locational franchising in the motor vehicle industry are widely recognized. When new manufacturers—for example, those from abroad—have entered the American motor vehicle marketplace, they have invariably chosen to establish a network of franchised

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ing, daily rentals and facilities development. It also conducts national advertising, promotional and other marketing programs and assists dealers in developing complementary group and individual programs."

[15] For example, each of the 33 Ford dealers serving the San Francisco metropolitan area has an average operating investment of $550,000 (excluding facility costs in the range of $1.0-$1.5 million per dealer) and an average investment of over $100,000 in replacement parts alone. Each employs an average of 23 trained technicians and other personnel for servicing and repairing new and used vehicles. As of October, 1976, the total investment in facilities occupied by Ford and Lincoln-Mercury dealers throughout the United States was approximately $2.4 billion.

dealers at approved locations. The conduct of these newer entrants thus confirms the experience of the established manufacturers, which tried virtually every means of distribution over the years but concluded that distribution through franchised independent dealers at approved locations was competitively the most effective method.[16]

Even critics of the motor vehicle industry concede the many benefits of the dealer franchising system. For example, one of the commentators on whose articles the dissenters below relied [17] stressed that wholly unrestricted distribution of complex products such as automobiles and trucks would render the manufacturer competitively ineffective and produce results harmful to the consumer:

> "If the manufacturers responded to every order of an individual who is willing to pay cash for an automobile, *the distribution process would become a horrible mess.* The administration of such a system would be unduly costly. Delivery costs would be inflated. Moreover, the companies would have to perform the dealers' duty of car preparation at the factory. Large amounts of money would be necessary to stock the cars, whether near the factories or in several wholesale outlets. A network of strategically located retailers alleviates all these burdens." [18]

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[16] "Almost every variety of marketing device was tried. Practically every company sold some cars directly to the consumer. Many sold by mail order and some through large department stores. Some sold on consignment, others on credit or cash in advance." Ford Motor Company, *Evolution of the Ford Franchise Distribution System* 3 (October 1973). Copies of this publication are being lodged with the Court for its convenience.

[17] *See* 537 F.2d 980, 1025, 1028-29 (9th Cir. 1976) (Browning, J., dissenting).

[18] Schmitt, *Antitrust and Distribution Problems in Tight Oligopolies—A Case Study of the Automobile Industry*, 24 Hastings L.J. 849, 874 (1973) (emphasis added). *See also id.* at 876, 898.

The same commentator further conceded that servicing and replacement parts can be provided more efficiently and more cheaply by "a limited number of selected dealers." [19]

The commentators who have criticized locational franchising largely evidence two misconceptions. First, they make unwarranted assumptions about the supposed evils of "product differentiation" [20] and about possible relationships between product differentiation and franchising.[21] Second, and of more analytical importance, these

[19] "The public received a reasonably reliable means of transportation only after there were outlets for replacement parts and persons trained in repair. Moreover, as manufacturers guaranteed free repair work immediately after purchase, this warranty had to be fulfilled by trained mechanics. *The distribution of cars and parts would have proven less efficient and more costly if the manufacturers had not concentrated these tasks in the hands of a limited number of selected dealers.*" Schmitt, *supra* note 18, at 878 (emphasis added).

[20] "Product differentiation" is action by a firm to differentiate its goods and services from those offered by its competitors. *See* F. Scherer, *Industrial Market Structure and Economic Performance* 324 (1971).

[21] *See* Schmitt, *supra* note 18, at 876-81; Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 Harv. L. Rev. 1419, 1423-27 (1968).

These commentators err in regarding all "product differentiation" as socially undesirable. Where products are in fact different, a manufacturer helps the consumer by pointing out the different features of its product and providing, with the "brand" label, a convenient means of assuring the consumer that the product has the features that interest him. When manufacturers stress the ways in which their products are "better," they are thus serving an important consumer information function, as well as promoting their own products. Moreover, the fact of product variety itself benefits consumers. The greater the variety of available products, the greater the likelihood that each consumer will get what he wants. *See, e.g.*, F. Scherer, *supra* note 20, at 324-25; Chamberlin, *Product Heterogeneity and Public Policy*, Am. Econ. Rev. 85-92 (May 1950).

Moreover, even assuming that manufacturers might wish to create "artificial" product differentiation by noninformational promotion of products that have no real differences, there is nothing to suggest that this is a purpose or effect of limiting the number of dealers or specifying their locations. Manufacturers can promote their products directly or give dealers allowances usable only for that purpose; there is no need to limit the number of dealers or specify their outlets. Household bleach, it may be noted, is not distributed through franchised dealers. *Cf. FTC* v. *Procter & Gamble Co. (Clorox)*, 386 U.S. 568 (1967).

Finally, to the extent that dealer organizations are relied on by manufacturers to promote their products, it must be because no other means of promotion is as efficient. If locational franchising were outlawed, promotion would not cease but would simply be carried out by less efficient, more costly methods—a result benefiting no one.

commentators show an inadequate understanding of the practical economic reasons why distribution through franchised dealers selling from specified locations may be the most efficient and effective way for a particular manufacturer to compete.

2. *Market Conditions May Require Manufacturers to Franchise by Location in Order To Be Efficient and Competitively Effective.*

As indicated above, it cannot be suggested that motor vehicle users would be better off if manufacturers were to deliver their products to any retailer with the necessary cash and then stop worrying about what happened next. That may be the best way to distribute magazines or chewing gum, but it would be a competitively disastrous way for a manufacturer to try to meet consumer needs for motor vehicles.

Petitioners concede that a manufacturer should be free to sell to only a limited number of dealers in any one area, or even exclusively to only one. Yet they claim the manufacturer should not be permitted to ensure that these dealers, once selected, will operate from efficiently spaced locations, contending that unrestricted entry by franchised dealers is best calculated to produce the set of dealer locations most conducive to the

competitive effectiveness of the manufacturer and the welfare of the consumer. Petitioners' position is internally inconsistent, contrary to sound competitive economic principles long recognized by antitrust courts, and belied by the actual business experience of competitors in the motor vehicle industry.

To concede that a manufacturer, in the interest of efficient distribution, may limit the number of dealers to whom he will sell is to recognize that in the real world unrestricted dealer entry may neither be procompetitive nor best serve the interests of consumers. Yet a location clause is the minimum restraint necessary to make the manufacturer's limitation on the number of dealers stick. It is, in short, a reasonable ancillary restraint, well within the category of restraints—such as covenants not to compete in the sale of a business, or provisions limiting a joint venture company's competition with its parents—that have long been upheld as reasonably ancillary to transactions and activities that promote rather than restrain competition and trade.[22]

The ways in which limitations on the number of dealers, and location clauses ancillary thereto, may serve to promote efficient distribution and hence consumer interests are well illustrated by the distributional needs of the automotive industry.

a. *The "free-ride" phenomenon, which is detrimental to consumer and manufacturer alike, can be prevented only by means of locational restrictions.*

In order to determine which of several competing products most suits his needs, the consumer must have information about the available products, their similarities and differences, and their comparative suitability to his purposes. With a product like a toothbrush, which is simple, cheap and is purchased often, trial and error can provide the experience necessary to enable the consumer to make an informed choice among types and brands. The "point-of-sale services" required are thus minimal.

But a product like an automobile, a truck, or a color television set may be sufficiently complex to prevent the buyer from determining by mere observation exactly how it will function. It may be purchased so infrequently (and at such cost) that trial and error is an unacceptable basis for evaluation. In this situation, the buyer needs considerable pre-sale services before he can make an informed choice. Some of these services, such as general information about the merchandise, can be provided in written or other form by the manufacturer. But much of the necessary information must be imparted at the point of sale by the dealer. The buyer of a truck, for example, needs painstaking individual attention to choose the combination of optional components that will best assure that his particular needs are met.[23] And a typical automobile buyer personally examines many available models in dealers' showrooms, discusses a variety of optional equipment with dealer personnel, and may also test-drive the authorized dealer's cars prior to any purchase. The dealer also performs certain post-sale services, such as periodic check-ups, for which he is

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[22] *See* Judge Taft's classic exposition of the ancillary restraint doctrine in *United States* v. *Addyston Pipe and Steel Co.*, 85 F. 271, 280-81 (1898).

[23] The business of selling trucks involves extensive discussion and counseling between sales persons and the prospective purchaser. In order to enable the customer to haul the maximum payload of his contemplated cargo at the lowest operating cost per mile, the dealer's technical personnel must determine the appropriate engine size and the proper combination of transmission, clutch, and driveshaft. In addition, particular loading and unloading requirements must be provided for, and the truck must be made to conform with the weight, length, and safety laws that will govern the customer's operations.

not separately compensated by either the consumer or the manufacturer.

A distributional system that did not provide such point-of-sale services would require the consumer to buy expensive items without adequate information and thus impede him from obtaining the product best suited to his needs, undoubtedly to the detriment of the consumer's welfare and the manufacturer's competitive effectiveness. Product distribution free of manufacturer influence would, however, lead to just such a result. Each dealer would recognize that if he incurred the expense of providing the necessary point-of-sale services, and raised the price of his product accordingly, another dealer selling the same brand could forego the services and undercut his prices. Consumers then could take advantage of all the services offered by the first dealer and buy from the second at the lower price.[24] Rather than suffer the competitive disadvantages of such a "free ride" by other dealers, each dealer would opt to provide minimal services and thereby enable himself to meet his competitors' prices.[25]

Manufacturer specification of dealer selling locations is a reasonable and minimally restrictive way to overcome this market dysfunction. By establishing reasonably spaced dealer selling locations, the manufacturer assures each dealer a group of potential customers to whom he is the nearest and most convenient seller and eliminates the possibility that other dealers will set up nearby unauthorized locations—unequipped to provide adequate pre- and post-sale services—and take a "free ride" on his services. Each dealer thus obtains an incentive to provide point-of-sale services to maximize his sales within his area of competitive advantage. But the freedom of every dealer—including some with an approved location quite close by—to sell to any customer, wherever located, preserves the maximum degree of interdealer and intrabrand competition consistent with the competitive effectiveness of the manufacturer and the welfare of the consumer.[26] As shown in Part II-A below, location

[24] *See* Posner, *supra* note 1, at 285.

[25] This is a classic "prisoner's dilemma" situation. *See, e.g.*, P. Samuelson, *Economics* 506-07 (10th ed. 1976). Each dealer's benefit is higher if all provide the necessary point-of-sale services than if none does, because the better-informed consumers are more likely to be pleased with the products they buy and therefore more likely to buy again. But each dealer can achieve an even higher benefit if he avoids providing those services while others provide them, allowing him to take a "free ride." Any dealer who provides the services when another does not receives the lowest benefit: He may be forced to sell at prices that do not cover his costs. Under these circumstances, each dealer rationally pursuing his own interest will choose *not* to provide any services—to the serious disadvantage of the manufacturer and the consumers to whom it is trying to market its products.

[26] The record in this Court in *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), affords ample illustration. In the Los Angeles metropolitan area there were 85 Chevrolet dealers selling throughout the area and beyond. Record 1233. There was an average of five other Chevrolet dealers within five miles of each of the 85 dealer locations. Record 1377. The dealers in Orange County (part of which was in the Los Angeles metropolitan area, Record 607) in the year 1960 made 3753 of their 6157 sales (or 61%) outside the city where located and even sold a high percentage of cars (16%) outside Orange County in 24 other counties of California. Attachment 1, Stipulation No. 5, filed May 20, 1974 (District Court Record). Indeed, under the Chevrolet selling agreement each of the 85 dealers' areas of sale responsibility was the entire Los Angeles metropolitan area (Record 12), and hence each dealer was obligated to promote sales to customers near other dealers' locations as well as near his own.

As another example, Paragraph 2(a) of the Standard Provisions of the Ford Sales and Service Agreements states explicitly that "the Dealer shall not be limited to the DEALER'S LOCALITY in making sales." Publicly available registration records show that a typical Ford dealer in a metropolitan area experiences only about 37% of his total sales in the immediate area around his location. He experiences 77.3% of his total sales in this same area plus those areas immediately adjacent to the respective locations of other Ford dealers which encircle him. The remaining 22.7%

clauses thus are much less restrictive than the closed selling territories involved in *Schwinn* and are consistent with vigorous intrabrand competition.[27]

b. *Dealers' incentives to open additional selling locations may conflict with the long-term interests of manufacturer and consumer.*

Manufacturers seek to maximize the amount of merchandise they can sell, while providing satisfactory services for the consumer to protect their long-term goodwill. If demand in an area increases to the point that another dealer location can profitably be opened, the manufacturer will—as a matter of its own self-interest—authorize such a location for a new or existing dealer. In the motor vehicle industry, for example, manufacturers decide the number of dealers and their locations on the basis of comprehensive studies and analyses of

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of the sales of such dealer fall elsewhere in essentially unpredictable patterns, some within other parts of the metropolitan area and some beyond.

[27] Three other methods of achieving this result can be imagined. None of them is nearly so satisfactory as the dealer location clause. One would be to allow dealers to agree among themselves about the level of point-of-sale services each will provide. But the dealers would not share the manufacturer's incentive to minimize distribution costs, and their agreements would be subject to anticompetitive abuse. *See* Posner, *supra* note 1, at 287, 298-99. Compare *United States* v. *Sealy*, 388 U.S. 350 (1967). A second method would be to sell the point-of-sale services as a separate product, thus allowing equal price competition for the product itself. *See* Comanor, *supra* note 21, at 1433. It is simply inconceivable, however, that an automobile dealer, for example, could ever sell admission to his showroom or the time of his salesmen, or charge for test-drives, without suffering more from the negative reactions of consumers than the provision of those services would be worth. Finally, manufacturers could require in the franchise contract that dealers offer full point-of-sale services at all locations, but the economic pressure on the local dealer to take advantage of "free-ride" possibilities would be so great that an extensive, costly policing system would have to be developed by the manufacturer. Moreover, proliferating locations would produce wasteful duplication of facilities. Locational restrictions, whose violations are much more easily detected, minimize these problems.

sales potential.[28] Each manufacturer periodically reviews its dealerships and reconsiders how many dealer locations it should have in an area and where they should be sited. The aim is to provide a dealer location for every neighborhood that can support one and not to put two locations in a neighborhood which can support only one. In this way the manufacturer seeks the continuous, competitively effective long-term presence of full-service dealers in as many communities as practicable throughout the country.

Dealers, however, look at the issue of opening additional locations from a different perspective. They are normally and properly concerned with their own ability to make a profit, generally over a shorter term than the manufacturer looks to, and with only their own costs considered. For some simple products like toothpaste, the decisions of retailers might be expected to yield results favorable to all concerned. But in the distribution of complex products such as motor vehicles, decisions based on the interests of each individual dealer alone, free of manufacturer influence, could seriously harm the interests of the consumer as well as the manufacturer.

A car or truck buyer knows that his purchase will last many years, and he relies heavily on the expectation that a dealership will be there to stand behind the vehicle if it proves defective and to provide quality service when needed. The consumer has a similar interest in the continuous availability of competent servicing establish-

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[28] Manufacturers project the sales potential of each area from motor vehicle registration data in public records. They also make extensive field studies. *See* Affidavit of Rudolph F. Schreitmueller, reprinted at pages 202-18 of the appendix in this Court in *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). Mr. Schreitmueller's affidavit and other materials in the appendix in that case describe the development and benefits of General Motors' franchising system, which is typical of the industry generally.

ments in communities throughout the country should he move or travel. The consumer's interest in local and nationwide service availability is not shared by a dealer who can reap short-run profits from a new selling location even if, because of failure of the franchised servicing dealer, consumers later turn to other brands. But the consumer's interest is shared by the manufacturer, whose long-term sales and competitive position will depend on the consumer's expectations of service continuity being satisfied.[29]

The costs to the manufacturer of continuous entry and exit at the dealer level are substantial as well. New franchised dealers in the automobile industry require a heavy investment by the manufacturer. The dealer's personnel must be trained to perform all of the services expected by the consumer—pre-sale preparation, marketing, and post-sale maintenance and repair. If excessive opening of unfranchised new locations causes unnecessary turnover or lowering of service quality among franchised dealers, this manufacturer investment is wasted and the total cost of distribution increased. The dealer franchised for one location who opens an additional unfranchised location has no reason to consider that loss, but the manufacturer does.[30] Since the interests of the

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[29] In economic terms, this consumer interest is "external" to the dealer's decisionmaking but "internal" to that of the manufacturer. Decisions that do not take account of such "externalities" cannot be expected to produce the most socially desirable results. *See generally* P. Samuelson, *supra* note 25, at 476-78. For an analysis of why the consumer does not or cannot correct this type of market misallocation, *see* Schelling, *On the Ecology of Micromotives*, 25 The Public Interest 61 (1971).

[30] The district court in *Schwinn* found that the manufacturer there had adopted locational franchising of retailers to protect its similar investment in its relationships with dealers. Many of Schwinn's costs in dealing with its retailers varied with the number of retailers, not with the volume of their sales. *See United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323, 337-38 (N.D. Ill.

dealer who opens an additional unfranchised location coincide less with the interests of consumers than do the interests of manufacturers, consumer welfare will benefit if the manufacturers specify the locations.

3. *This Court Should Not Fashion Antitrust Rules That Would Compel Manufacturers to Choose Distribution Systems Less Beneficial to the Consumer.*

If this Court were to condemn location clauses, and the franchising systems built on them, as *per se* illegal, consumers would almost certainly be harmed. Manufacturers that now use locational franchising would be forced to choose between wholly unrestricted distribution and forward vertical integration. If they chose the former, the inefficiencies outlined above would be endemic—to the detriment of both manufacturers and consumers. If the manufacturers tried to avoid those problems through vertical integration, as Schwinn did after this Court condemned its restrictions on distributors,[31] consumer welfare could also suffer.

Vertical integration, though it may achieve economies comparable to those of franchising, may also create offsetting diseconomies that make it, if forced on a manufacturer against its better business judgment, less beneficial for both manufacturers and consumers. Integration transforms the independent local retailer into the

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1965), *rev'd on other grounds*, 388 U.S. 365 (1967). This Court on appeal did not disturb those findings or disapprove Schwinn's locational franchising of retailers. *See* Part II *infra*.

[31] *See* L. Rubin, The Theory of Franchising (1973) (unpublished Ph.D. thesis in Univ. of Pa. Library) at 181. ABA Antitrust Section, *Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition* 49 (forthcoming 1977) (final manuscript as approved for publication). For the convenience of the Court, manuscript copies of this forthcoming publication are being lodged with the Court.

employee of a large, integrated firm. The retail outlet may thus lose the ability of an independent franchisee to respond to changes in local conditions. To the extent that control is centralized, control costs and complex managerial requirements may arise that counterbalance the benefits of integration. To the extent that there is an interest in having opportunities for independent entrepreneurship in distribution, that interest is obviously not served by forcing manufacturers to integrate where they would not otherwise do so.

None of this is to say that existing locational franchising systems are perfect, in the motor vehicle industry or elsewhere. Those systems have evolved over many years in response to the inadequacies of other methods of distribution, and they will keep evolving in response to new consumer demands and changing economic conditions. But there is no reason to believe that improvement will come from a judicially imposed *per se* rule that forbids the manufacturer to control its dealers' locations, no matter how sound his competitive reasons for doing so, and no matter how closely they coincide with the consumer's interests. Since the manufacturer has no reason to exercise that control to its own detriment or the consumer's, it can be expected to respond to any consumer pressure for change in existing systems. Moreover, the "new economics of vertical relations" is increasingly illuminating the economies that can be achieved by manufacturer influence on dealer practices.[32] Further evolution of practice and theory in this area should not be strait-jacketed by a rigid *per se* rule.

[32] Phillips, *supra* note 3, at 574.

II. LOCATION CLAUSES ARE LAWFUL BECAUSE THEY ARE NECESSARY AND REASONABLY ANCILLARY TO DISTRIBUTION THROUGH SELECTED, FRANCHISED DEALERS.

Where the most efficient and competitively effective way to distribute a complex consumer product is through selected independent dealers, location clauses are reasonable, ancillary conditions necessary to make the selective distribution system work. Petitioners herein, and the dissenters below, acknowledge that "franchising by location" is a method of distribution that has been consistently upheld by the courts under the rule of reason, both before and after *Schwinn*. A manufacturer cannot, however, effectively implement a system of locational franchising unless it may control the opening of additional or substitute locations by its dealers. The limited, ancillary restraint that a location clause imposes on dealers should not be condemned by an unwarranted extension of the *Schwinn per se* language.

A. The Courts Have Consistently Held That Location Clauses Can Be Justified Under the Rule of Reason.

Both the petitioners and the dissenters below accept the established proposition that a manufacturer may "franchise by location."[33] Their disagreement with the majority stems largely from their misunderstanding of what that practice necessarily entails. We submit that the majority was correct in concluding that "franchising by location" is a meaningless phrase unless the manufacturer is allowed to exercise authority over the opening by a dealer of additional locations not specified in his franchise. Without an enforceable location clause forbidding a dealer to open a new location without the manufacturer's consent, "franchising by location" would

[33] *See* Brief for Petitioners 42-49; 537 F.2d at 1014-17 (Kilkenny, J., dissenting).

exist, if at all, only at the election of individual dealers. The lower courts have understood this simple fact and have accordingly upheld location clauses as reasonable conditions on how a dealer sells.

The reasonableness of location clauses was established, long before *Schwinn*, in the leading case of *Boro Hall Corp.* v. *General Motors Corp.*, 124 F.2d 822 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943). In an opinion by Judge Augustus Hand, the Second Circuit there held that a contractual clause fixing "a location for the sale of used cars at a place that did not unduly affect other dealers" did not constitute an unreasonable restraint of trade. *Id.* at 823.

The rule of *Boro Hall* has prevailed without contrary authority for many years. In 1966, ten months before *Schwinn*, this Court found it unnecessary to rule on the lawfulness of location clauses in *United States* v. *General Motors Corp.*, 384 U.S. 127, 139-40 (1966).[34] On remand in that case, the district court expressly decreed, without objection by the United States, that General Motors was free unilaterally to enforce its location clauses.[35]

Schwinn did not touch the validity of location clauses. Although Schwinn's distribution program included location clauses specifying the locations from which retailers could sell,[36] the validity of those clauses was not ques-

[34] *See also id.* at 149 (Harlan, J., concurring) ("In my opinion, . . . General Motors is not precluded from enforcing the location clause by unilateral action, and I find nothing in the Court's opinion to the contrary.")

[35] *United States* v. *General Motors Corp.*, Civ. No. 62-1208-CC (S.D. Cal. Aug. 17, 1966) (unreported), *quoted in* the opinion below, 537 F.2d at 993-94.

[36] *See United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323, 325 (N.D. Ill. 1965), *rev'd on other grounds*, 388 U.S. 365 (1967); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 370 (1967).

tioned by the district court or attacked by the Government on appeal.[37] The issues which the Government brought to this Court related to (1) Schwinn's arrangements for "territorial exclusivity" among wholesalers, and (2) its restrictions on the classes of customers to whom both wholesalers and retailers could sell. 388 U.S. at 371-74 & n.5, 376-77. Schwinn gave each wholesaler a specified territory (in many cases exclusive of any other wholesaler) and forbade it to sell to retailers located outside that territory.[38] Schwinn also specified the categories of customers to whom a wholesaler could sell (only to franchised retailers) and to whom a retailer could sell (to any consumer, but not to another retailer or a discount house). As explained in Part III below, the Court upheld these restrictions under the rule of reason as they related to bicycles sold on a consignment or agency basis but declared them invalid *per se* as they related to bicycles sold to wholesalers or retailers for resale.[39] The validity of Schwinn's location clauses for retailers was not before this Court and was not decided by it.[40]

[37] *See United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323 (N.D. Ill. 1965), *rev'd on other grounds*, 388 U.S. 365 (1967); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 370-71, 376-77 (1967).

[38] *See also White Motor Co.* v. *United States*, 372 U.S. 253, 255-56 (1963) ("typical" territorial clause obligated wholesaler "not to sell such trucks except to individuals, firms, and corporations having place of business and/or purchasing headquarters in said territory").

[39] As to the invalidity of the post-sale territorial restrictions, the Court's statement was *dictum*. See note 61 *infra*.

[40] Petitioners quote (at 34) this Court's statement that, "The principle [condemning restrictions on the classes of customers to whom a wholesaler who owns the goods may resell] is, of course, equally applicable to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products." 388 U.S. at 378. That

Location clauses are obviously less restrictive than the territorial restrictions involved in *Schwinn*. Petitioners' attempt to equate the two is unavailing. They argue that there is a mere difference in "form" between a manufacturer's dividing a city into two exclusive territories, which it assigns to two different dealers, and its assigning locations to the dealers in different parts of the city.[41] But exclusive territories wall out all competition among dealers—none is allowed to sell to customers residing outside his territory. Location clauses merely specify the locations from which the dealers may sell. They remain free to—and do—sell to any customer, regardless of the customer's home or place of business.[42] A dealer with a "location east of 12th Street" [43] may sell to customers anywhere in the city and beyond.

Every lower court that has considered the question has agreed that *Schwinn* did not strike down location clauses, whether in consignment or sale transactions. Indeed, the final decree on remand in the *Schwinn* case itself expressly sanctions such clauses.[44] And location

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sentence appears in a passage that discusses Schwinn's customer restrictions, requiring wholesalers to sell only to franchised retailers and such retailers to sell only to consumers. Nowhere in the passage does the Court mention the location clauses for retailers, which were not before it, or purport to address the issue left open in *United States* v. *General Motors*. The Court's reference to "the retailer's freedom as to where and to whom it will resell" thus should be read to relate only to the issue before the Court concerning the validity of restrictions on the *customers* to whom retailers could sell. *See also id.* at 379.

[41] Brief for Petitioners at 31-35.

[42] *See also* note 26 *supra*.

[43] Brief for Petitioners at 32.

[44] The decree contains general language tracking this Court's opinion, followed by this proviso: "Notwithstanding the foregoing provision, nothing in this Final Judgment shall prevent Schwinn . . . from designating in its retailer franchise agreements the location of the place or places of business for which the franchise is issued." *United States* v. *Arnold, Schwinn & Co.*, 291 F. Supp. 564, 565-66 (N.D. Ill. 1968).

clauses have been expressly upheld in four cases since *Schwinn*, including the *en banc* decision below. *See Salco Corp.* v. *General Motors Corp.*, 517 F.2d 567 (10th Cir. 1975); *Kaiser* v. *General Motors Corp.*, 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd mem.*, 530 F.2d 964 (3d Cir. 1976); *Sheldon Pontiac* v. *Pontiac Motor Division*, 418 F. Supp. 1024 (D.N.J. 1976).[45] Commentators and the Department of Justice have agreed that location clauses are not *per se* unlawful after *Schwinn* but are to be tested by the rule of reason.[46]

Petitioners do not challenge the authority of these post-*Schwinn* cases, except for the decision below. Rather, petitioners argue that all the cases but this one merely upheld location clauses in the abstract, on records that were "devoid of suggestion that the manufacturer also obtained and enforced promises by dealers that they would not ship merchandise for resale to locations where they were not franchised." [47] But a location clause *is* just

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[45] *See also United States* v. *Revlon, Inc.*, 1975-1 Trade Cas. ¶ 60,202 at 65,727 (S.D.N.Y. 1975) (location clauses said to be *per se* unlawful under *Schwinn*), *modified*, 1975-2 Trade Cas. ¶ 60,583 (S.D.N.Y. 1975) (permits use of location clauses).

[46] *E.g.*, Robinson, *Recent Antitrust Developments: 1974*, 75 Colum. L. Rev. 243, 276 (1975); McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal*, 37 Antitrust J. 137, 144-45 (1968); Pollock, *Alternative Distribution Methods After Schwinn*, 63 Nw. U.L. Rev. 595, 603-04 (1968); *cf.* New York State Bar Association, *1968 Antitrust Law Symposium* 60-65 (1968); A.B.A. Committee on the Clayton Act, *Marketing and Franchising: Antitrust Prognosis for the 70's*, 39 Antitrust L.J. 502, 516 (1970) (Panel discussion).

For the view of a Justice Department spokesman, *see* K. Clearwaters, *Franchising and the Antitrust Laws*, Address Before International Franchise Association, May 16, 1974, *quoted in* Robinson, *supra* at 276 n.207, and in the opinion below, 537 F.2d at 996.

[47] Brief for Petitioners at 46.

such a promise. In *Salco*, the facts developed on the manufacturer's motion for summary judgment showed that the manufacturer had "assert[ed] its rights under the terms of the clause by insisting on the right to approve a new location for Denver Buick." 517 F.2d at 576.[48] Nonetheless, the Tenth Circuit held that "the Section 1 allegations were properly dismissed, since the location clause is valid as a matter of law, and there are no allegations that would amount to an unlawful use of the clause." *Id.* And nothing in any of the other decisions suggests that the courts, in upholding location clauses, thought the clauses could be evaded by the simple device of opening a "non-franchised" location without manufacturer approval.

Common sense itself refutes petitioners' suggestion that, in upholding "the practice of franchising by location," the courts held only that the manufacturer may prohibit a dealer from "holding himself out" as a franchised dealer at locations other than those authorized by the manufacturer.[49] Petitioners' argument is, in effect, that a manufacturer may not control a dealer's opening of new locations but may control only what sign the dealer puts over the door. The court below rightly termed that argument "spurious." [50] The legitimate competitive and pro-consumer purposes of distribution through selected dealers at specified locations, discussed in Part I above, require that the manufacturer be able to control the number and location of the outlets for his product. Those purposes would be wholly frustrated if any dealer were free to establish as many additional locations as he wished, wherever he wished, as long as he refrained from

[48] *Salco* involved a dealer's attempt to change locations rather than to open an additional location, but the principle applicable to the two situations is the same.

[49] Brief for Petitioners at 46-47.

[50] 537 F.2d at 994 n.22.

calling himself an "authorized dealer" at the extra locations.[51] "Franchising by location," if it means anything, must mean that the manufacturer controls the location at which the franchisee will do business in selling and servicing the manufacturer's products. *See* opinion below, 537 F.2d at 994 n.22.[52]

B. The Courts Have Upheld Exclusive Franchises, Which Are More Restrictive Than Location Clauses.

When a manufacturer grants an exclusive franchise, it assigns a dealer a specified location *and* promises the dealer that it will not authorize any competing dealers to sell from locations within a specified surrounding area. *E.g.*, *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). Such arrangements between a manufacturer and his retailers are an exercise of the former's right to "select his customers, and for this purpose [to] 'franchise' certain dealers to whom, alone, he will sell his goods." *Schwinn*, *supra*, 388 U.S. at 376; *see id.* at 379-80. To keep his promise of exclusivity to one dealer, the manufacturer must impose, and be able to enforce, location restrictions on other dealers he may franchise.

The authorities upholding exclusive franchises, both before and after *Schwinn*, are so overwhelming that even the petitioners do not question them. As the court below noted, the cases amount to a "veritable avalanche of precedent" in favor of the lawfulness of exclusive fran-

[51] Moreover, when the product bears the manufacturer's trademark and is accompanied by the manufacturer's informational brochures and warranties, any location from which it is sold will appear to be an authorized location, and any shortcomings in the manner of sale or accompanying services will harm the manufacturer's goodwill. Also, since the dealer is "authorized" at another location, the consumer cannot be expected to know where he is acting as an "authorized" dealer and where not.

[52] *See also* Pollock, *supra* note 46, at 603-04.

chises. 537 F.2d at 997. But petitioners contend that in upholding exclusive dealerships the courts have engaged in empty formalism. Petitioners would distinguish between the lawfulness of the manufacturer's promise not to franchise other dealers in an area and the lawfulness of the actions necessary for him to keep his promise. They argue that, under *Schwinn*, a manufacturer may not keep other dealers from locating in the area of the exclusive dealership. Such a rule would mean, as the court below said, that, "*if a dealer is franchised anywhere he is franchised everywhere.*" [53] The manufacturer could keep its promise not to franchise other dealers in the first dealer's area only by refraining from franchising any more dealers at all.

Petitioners do not deny that this construction of the *Schwinn per se* rule would effectively destroy exclusive franchises. But they argue that the *Schwinn per se* rule (as they construe it) must "get priority . . . . [O]therwise the rule about exclusives would destroy the *Schwinn per se* rule." [54] Petitioners miss the point of the cases upholding exclusive franchises after *Schwinn*. The *Schwinn per se* rule prohibits a manufacturer from specifying the customers to whom a purchaser may resell the product—either by prescribing classes of customers or by confining the purchaser's marketing to a designated territory. In upholding exclusive franchises after *Schwinn*, the courts have necessarily held that the rule does not condemn restrictions on the location from which the dealer may resell.[55] Under that correct reading of

[53] 537 F.2d at 998 (emphasis in original).

[54] Brief for Petitioners at 44-45.

[55] The courts have also upheld after *Schwinn* other restrictions on the *focus* of dealer activities. A manufacturer may assign to dealers "areas of primary responsibility," within which they are to concentrate their efforts; and it may impose "profit pass-over agreements," under which a dealer who sells in another dealer's

the *Schwinn per se* rule, it does not conflict at all with the cases upholding exclusive franchises and location clauses.[56]

In sum, the lower federal courts have recognized that location clauses and even exclusive franchises are reasonably ancillary to lawful systems of locational franchising. Those arrangements have long been upheld under the rule of reason, and the lower federal courts have overwhelmingly ruled that they are not touched by the *Schwinn per se* rule. Petitioners offer no authority to the contrary, but only an unpersuasive extension of *Schwinn* that would vitiate both the arrangements and the decisions upholding them.

area is required to pay the other dealer a specified percentage of the price received. *See* ABA Antitrust Section, *supra* note 31, at 35-37 and cases cited.

[56] Seeking a way to distinguish the exclusive distributorship cases, petitioners urge that there is less danger to competition in the manufacturer's promise not to franchise other dealers in an area than in the dealer's promise not to expand to other locations. Brief for Petitioners at 43-44. That ignores the fact that exclusive franchises necessarily involve *both* promises. Location clauses, which involve only the dealer's promise *without* a reciprocal promise by the manufacturer, are necessarily less restrictive because the manufacturer preserves its freedom to franchise additional nearby dealers as its competitive interest warrants. *See* Posner, *supra* note 1, at 283, 287, 298-99.

Petitioners also argue that location clauses are unreasonably restrictive because, "[w]ithout the investment and risk of forward integration, the manufacturer appropriates control over one of the most crucial competitive decisions any truly independent trader must make—where he will sell his wares." *Id.* at 43. That argument suggests that the supposed evil of location clauses is the dealers' loss of freedom. But the primary danger posed by any vertical restraint is the possibility that it results from a camouflaged dealer cartel. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 407-08 (1911); *United States* v. *General Motors*, 384 U.S. 127 (1966); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 157-58 (1968) (Harlan, J., dissenting). To suggest that vertical restraints are invalid because they limit dealers' freedom "stands *Dr. Miles* on its head." Posner, *supra* note 1, at 289-90.

III. IF *SCHWINN'S* BROAD *PER SE* LANGUAGE CONFLICTS WITH THESE SOUND ANTITRUST PRINCIPLES, THAT LANGUAGE SHOULD BE RECONSIDERED.

As demonstrated in Part II above, the decision below can be affirmed without reconsideration of the *Schwinn per se* language. However, such an affirmance would leave the law governing vertical restraints on the scope or focus of dealer marketing activities, as enunciated by this Court, in its present unsatisfactory state. The rationale of the *Schwinn per se* rule is, after all, faulty and unpersuasive. Depending as it does solely on a commercial law distinction between sale and nonsale transactions, it requires lower courts to base their decisions on factors unrelated to the economic effects of vertical arrangements or the principles announced in other, better reasoned antitrust precedents. The *Schwinn per se* rule for sales transactions should be recognized as an aberration from the antitrust jurisprudence of vertical marketing restraints and should accordingly be repudiated by the Court.

A. *White Motor* and the *Schwinn* Ruling on Consignment and Agency Arrangements Establish that Vertical Territorial Restrictions Should Be Tested by the Rule of Reason.

In *Schwinn*, the manufacturer distributed its bicycles both by consignment or agency arrangements with wholesalers and by sales to wholesalers and retailers. In dealing with the consignment or agency arrangements, the Court applied a rule-of-reason analysis with careful attention to the economic consequences of the restrictions. That analysis was consistent with other decisions of this Court and should have been applied also to sales transactions.

Four years before *Schwinn*, this Court decided its "first case involving a territorial restriction in a *vertical* arrangement." *White Motor Co.* v. *United States*, 372 U.S. 253, 261 (1963) (emphasis in original). The Court reversed a summary judgment against a manufacturer with respect to the legality of vertical restrictions on territory and customer selection. The Court refused to rule on their validity as a matter of law, saying that "we know too little of the actual impact of both that restriction and the one respecting customers" to pass on their validity without factual proceedings. *Id.* The Court sharply distinguished vertical territorial limitations from horizontal ones, stating:

> "A vertical territorial limitation may or may not have that purpose or effect [to stifle competition]. We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . and therefore should be classified as *per se* violations of the Sherman Act." [57]

In *Schwinn*, the Court reaffirmed these conclusions. Mr. Justice Fortas' opinion for the five-justice majority noted that:

> "The Government does not contend that a *per se* violation of the Sherman Act is presented by the practices which are involved in this appeal . . . . Accordingly, we are remitted to an appraisal of the market impact of these practices." 388 U.S. at 373.

"Our inquiry," the Court said, "is whether . . . the effect upon competition in the market place is substantially adverse." 388 U.S. at 375. The Court began that inquiry by recognizing the established rule that "a manufacturer of a product other and equivalent brands of

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[57] *Id.* at 263, *quoting Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958). *See also id.* at 264 (Brennan, J., concurring).

which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods." *Id.* at 376. It refused, as in *White Motor*, "to introduce the inflexibility which a *per se* rule might bring if it were applied to prohibit all vertical restrictions of territory and all franchising . . . ," and observed that such a rule "might sharply accelerate the trend towards vertical integration of the distribution process." *Id.* at 379-80. The Court held that the territorial restrictions in Schwinn's consignment arrangements would be unlawful only if their impact was "unreasonably restrictive of competition." *Id.*

Analyzing the district court's findings about the effects of Schwinn's consignment restrictions, the Court found that "the rule of reason is satisfied." It identified four factors as critical to that conclusion:

(1) competitive bicycles were available;

(2) Schwinn dealers were free to handle other brands of bicycles;

(3) the territorial restrictions were not ancillary to a price-fixing scheme; and

(4) the restrictions were justified by competitive pressures and preserved rather than damaged competition. *Id.* at 381-82.

The Court concluded: "Application of the rule of reason here cannot be confined to intrabrand competition. When we look to the product market as a whole, we cannot conclude that Schwinn's franchise system with respect to products as to which it retains ownership and risk constitutes an unreasonable restraint of trade." *Id.* at 382.[58]

[58] The Court reached this conclusion unanimously. Mr. Justice Stewart, joined by Mr. Jusitce Harlan, said, "I completely agree with the Court's basic approach to this case." *Id.* at 387. Those

But when the *Schwinn* majority turned to the identical restrictions in Schwinn's arrangements for sales to wholesalers and retailers, it failed to apply this careful analysis of economic effects. Instead, it asserted without explanation that "the ancient rule against restraints on alienation" compelled a holding that the restrictions were invalid. *Id.* at 380. In so ruling, the Court misconceived the nature and purpose of the common law rule disfavoring "restraints on alienation" and gave no explanation why federal antitrust law should follow that rule in lieu of its traditional attention to economic effects.[59] The Court did not dispute the statement by Mr. Justice Stewart in dissent that vertical restrictions in consignment and sales arrangements "may operate identically in terms of economic function and competitive effect." *Id.* at 393. The *Schwinn* majority did not even refer to the test this Court had established to determine the appropriateness of a *per se* rule—whether the challenged practices have such a "pernicious effect on competition and

Justices dissented from the majority's inconsistent *per se* approach to Schwinn's sales arrangements. *Id.* at 388-94.

[59] As Mr. Justice Stewart said, dissenting, the common law rule did not condemn all restraints on alienation but "concerned itself with arbitrary and severe restrictions on alienation, such as total prohibition of resale." 388 U.S. at 391. The rule apparently would not have been violated by the kind of restriction imposed by Schwinn on its dealers and, in any event, did not exist to promote competition. *See* Posner, *supra* note 1, at 296.

The *Schwinn* majority cited only *White Motor* and *Dr. Miles* to support the relevance of the "ancient rule" to vertical restraints under the Sherman Act. 388 U.S. at 379-80. In *White Motor*, the rule was mentioned only by Mr. Justice Brennan in concurrence, who asserted that the common law rule was *not* a reason to hold territorial restrictions *per se* unlawful unless the test of *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958) was satisfied. 372 U.S. at 365. In *Dr. Miles*, the Court mentioned the fact that resale price maintenance imposed a restraint on alienation primarily to counter Dr. Miles' contention that it had a common law right to establish resale prices. 220 U.S. at 404-05; *see* ABA Antitrust Section, *supra* note 31, at 61 n.125; Posner, *supra* note 1, at 288.

lack of any redeeming virtue" as to make unnecessary any "inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). Nor could the Court have found that test satisfied, in view of its conclusion that identical restrictions in Schwinn's consignment transactions had pro-competitive effects.

Rather, the majority appears simply to have concluded that the "ancient rule" foreclosed its attaching the same antitrust consequences to consignment and sale restrictions, despite their identical economic effects.[60] The Court's sweeping reference to the "ancient rule against restraints on alienation" (388 U.S. at 380) has thus been read to establish a *per se* rule condemning the restrictions involved in *Schwinn* whenever a manufacturer sells its products for resale to customers.[61]

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[60] The Department of Justice in *Schwinn* urged the Court *not* to distinguish between consignment and sale transactions, stating that there was no relevant difference between their economic effects. Brief for the United States at 54-57, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

[61] Throughout the opinion, the Court discussed Schwinn's customer restrictions and its territorial restrictions together. However, as the opinion acknowledged, 388 U.S. at 377, and as Chief Justice Burger has pointed out, *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 617 (1972) (dissenting opinion), the issue of post-sale territorial restrictions was not before the Court in *Schwinn*. The Court's discussion of it therefore was *dictum*. The trial court found that the territorial restrictions had resulted from an agreement among the distributors, and it held that the agreement was an unlawful horizontal restraint. *United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323, 342 (N.D. Ill. 1965), *rev'd on other grounds*, 388 U.S. 365 (1967). No appeal was taken from that ruling, *see* 388 U.S. at 368. Strictly speaking, therefore, the only post-sale restrictions before the Court were Schwinn's customer restrictions.

B. *Schwinn's* Creation of a *Per Se* Rule Based on the Distinction Between Consignment and Sale Has Been Criticized by the Courts, Commentators, and Antitrust Enforcement Authorities.

Nearly ten years have passed since *Schwinn* inserted the commercial law distinction between sale and consignment into the antitrust law of vertical restraints on the scope and focus of dealer marketing activities. Experience has confirmed that the distinction bears no relationship whatever to the economic effects of vertical arrangements. Faced with a rule that condemns vertical restrictions on purchasers, while upholding as reasonable and pro-competitive the same restrictions on agents or consignees, the courts, commentators, and antitrust enforcement authorities have roundly criticized the *Schwinn per se* rule and properly sought every available means to limit its application.

As noted in Part II above, the lower federal courts have held that *Schwinn* left intact the established law upholding location clauses, exclusive franchises, and other vertical restrictions not involved in that case. Moreover, even in cases involving territorial restrictions such as those in *Schwinn*, the courts since that decision have struggled to distinguish or limit the *Schwinn per se* rule to avoid the unjustifiable results that would flow from blind adherence to its broad language.

For example, the Third Circuit *en banc* has interpreted the majority's statement in *Schwinn* that it is unreasonable "without more" to impose post-sale restrictions as authorizing an exception to the *per se* rule where a manufacturer proves "more" by showing that the restraints will protect consumers against injury and the manufacturer against product liability claims.[62] The Third Cir-

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[62] *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932, 936-38 (3d Cir.) (*en banc*), *cert. denied*, 400 U.S. 831 (1970).

cuit has since suggested that the *Schwinn per se* rule may be inapplicable in any case "where a manufacturer's restriction is related to a legitimate business purpose." [63] Many courts have refused to invoke the *Schwinn per se* rule absent proof that the challenged restraints have been "firmly and resolutely" enforced.[64] Other courts have relied on various factual distinctions to justify upholding post-sale territorial restraints that would seem to fall within the language of the *Schwinn per se* rule.[65] Still other courts have enforced the *Schwinn per se* rule in the cases before them, but with suggestions that this Court make exceptions to it or redefine it.[66]

The justifications and distinctions offered by the lower courts in their ongoing struggle with the *Schwinn per se* rule would naturally bear on the validity of vertical restrictions under a rule of reason; but they are of dubious relevance under a strict *per se* approach. One does not

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[63] *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F.2d 840, 847 n.13 (3d Cir. 1974).

[64] *E.g., Janel Sales Corp.* v. *Lanvin Parfums Inc.*, 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968); *Good Investment Promotions, Inc.* v. *Corning Glass Works*, 493 F.2d 891, 893 (6th Cir. 1974); *Colorado Pump & Supply Co.* v. *Febco, Inc.*, 472 F.2d 637, 639 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973). *See generally* Robinson, *supra* note 46, at 273-74.

[65] *Carter Wallace, Inc.* v. *United States*, 449 F.2d 1374, 1379-81 (Ct. Cl. 1971) (*per se* rule inapplicable when a purchaser can avoid the restraints by electing to buy the product at a higher price); *LaFortune* v. *Ebie*, 1972 Trade Cas. ¶ 74,090, at 92,486 (Cal. Dist. Ct. App. 1972) (food industry distinguished from bicycle industry).

[66] *E.g., Adolph Coors Co.* v. *FTC*, 497 F.2d 1178, 1187 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (invited Supreme Court to grant "an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason"); *Eastex Aviation, Inc.* v. *Sperry & Hutchinson Co.*, 522 F.2d 1299, 1306 (5th Cir. 1975). ("Ancient rules of property law should not be made the basis for determining the application of modern rules of antitrust law.")

find federal courts enmeshed in the same kind of rationalizing when they sit in judgment on horizontal price-fixing conspiracies. The courts' invocation of such considerations in cases involving post-sale vertical restraints reflects their unwillingness to reach arbitrary and unjust results solely on the basis of a principle of commercial law unrelated to sound antitrust analysis.

The reaction of legal commentators to the *Schwinn per se* rule has been equally unkind. The doctrine announced by this Court has evoked repeated, trenchant, and nearly unanimous disapproval. The Ninth Circuit's *en banc* opinion in the instant case cites a sampling of the critical commentary.[67] The criticism continues unabated.[68]

Many antitrust enforcement authorities themselves have recognized that vertical territorial restrictions are more appropriately tested under the rule of reason than under a *per se* rule based on the distinction between consignment and sale. Donald I. Baker, now Assistant Attorney General for Antitrust, has described the *Schwinn* decision as "an exercise in barren formalism," which is "artificial and unresponsive to the competitive needs of the real world." [69] And Bruce B. Wilson, then Deputy Assistant Attorney General, urged in congressional testimony on behalf of the Department of Justice that, although *Schwinn* termed all post-sale territorial restraints *per se* illegal, the opinion leaves "some room . . . for con-

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[67] *See* 537 F.2d at 988 n.13.

[68] *E.g.*, Posner, *supra* note 1; Robinson, *supra* note 46, at 270-81; Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 Antitrust L.J. 537 (1975); Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration*, 44 Antitrust L.J. 557 (1975); Phillips, *supra* note 3. *But see* Blecher, *Schwinn—An Example of a Genuine Commitment to Antitrust Law*, 44 Antitrust L.J. 550 (1975).

[69] Baker, *supra* note 68, at 537.

sideration of the economic exigencies of particular situations." [70]

C. *Schwinn's* Broad Language Ignores the Manufacturer's Legal Responsibilities to Consumers and its Need to Ensure Dealer Marketing Practices that Help the Manufacturer to Meet those Responsibilities.

The *Schwinn* majority declared broadly that,

> "If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale." [71]

That statement, based on the ancient doctrine of restraints on alienation, is far too sweeping to fit the modern marketing of complex consumer products through "sales" to dealers who in turn "sell" to consumers. The manufacturers of such products have, as we have shown, an obvious economic interest in maintaining consumer goodwill and discharging their legal obligations by assuring that consumers receive the pre- and post-sale services they need to choose and use the product successfully.

In a very real sense, these manufacturers do not transfer the entire "dominion" or "risk of loss" to the distributors or dealers who are their immediate vendees;

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[70] Hearings on Exclusive Territorial Franchise Act Before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce, 93d Cong., 2d Sess. 17-18 (1974). That would also appear to be the view of at least one member of the *Schwinn* majority, who later indicated that *Schwinn* was really a rule-of-reason case. *See Albrecht* v. *Herald Co.*, 390 U.S. 145, 155-56 n.* (1968) (concurring opinion of Douglas, J.). *See also United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972) (vertical territorial restraints contrasted to *per se* unlawful horizontal restraints); *id.* at 617-18 (Burger, C.J., dissenting) (*Schwinn* described as rule-of-reason case).

[71] 388 U.S. at 379.

they continue to bear very substantial responsibilities for their products and a very substantial risk of loss throughout the entire period that their products are held by the dealer and the consumer.[72] They must be able to ensure that the retailers will follow practices that assist them in performing these tasks. Any requirements a manufacturer might impose with respect to a dealer's resale activities might be considered technically a "restraint on alienation." But many such requirements are obviously reasonable and necessary parts of a system of distribution through independent dealers.

A condition requiring the dealer to represent accurately the characteristics of the product, or to make it ready for sale as directed by the manufacturer, or to maintain adequate service facilities, or to help in recall and repair of defective items at the manufacturer's expense, is a "restriction" on the dealer's resale activities just as a location clause is. There are no differences between them that would justify testing the former type of condition under the rule of reason while banning location clauses *per se*. A location clause performs the essential function of assuring that reliable dealers will be present where and when needed to perform essential services that can only be done at the local level. That function differs in no relevant respect from the functions of many other requirements manufacturers must impose to ensure satisfaction of the consumer's needs and the manufacturer's duties. It is logically impossible to erect a *per se* fence between the reasonableness of such requirements and the claim of absolute illegality of a location clause.

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[72] *See* 388 U.S. at 392 (Stewart, J., concurring and dissenting).

D. Genuinely Vertical Territorial Conditions Should Be Judged Under the Rule of Reason.

This Court's decisions in *White Motor*, and in *Schwinn* itself, point the way back to a proper treatment of vertical restraints under the Sherman Act. As the Court said in *White Motor*, the judiciary's inexperience in dealing with vertical territorial restraints and the possibility that such restraints may have beneficial rather than anticompetitive effects favor the application of the rule of reason. This Court should renounce the artificial consignment/sale distinction, and the *Schwinn per se* rule based on it, and confirm that vertical restraints on the scope or focus of dealer marketing efforts will be judged under the rule of reason. So judged, such restraints will ordinarily be upheld, since the manufacturer will normally employ them to increase efficiency, competition, and consumer welfare.

As we have shown in Part I above, a manufacturer has no economic incentive to create monopoly conditions at the dealer or wholesaler level. On the contrary, the manufacturer has an interest in getting the product distributed in the most efficient and effective way possible, to make consumers as satisfied as possible with it. Any incentive the manufacturer may have to impose conditions on how its dealers resell arises from the need to ameliorate the circumstances that prevent a fragmented, uncoordinated distribution system from yielding efficient results. These conditions may have at most a *de minimis* effect on intrabrand competition, as with the motor vehicle industry's location clauses. Whatever their precise nature, they stem from the manufacturer's proper interest in a competitively effective dealer system that will efficiently meet consumer needs. Therefore, absent unusual circumstances that give a plausible reason to expect anticompetitive effects, genuinely *vertical* restraints imposed by a manufacturer on the scope or focus of dealer sales efforts should be upheld as reasonable.

The primary circumstance in which ostensibly vertical restraints may have significant anticompetitive effects is where the restraints actually result from a horizontal combination among dealers and have been imposed by them on the manufacturer.[73] Where territorial restrictions have "been induced solely or even primarily by [the] dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement." *White Motor Co.* v. *United States*, 372 U.S. 253, 267 (1963) (Brennan, J., concurring). In such an instance, the limitations would properly be regarded as horizontal, and their legality would be determined accordingly. *See United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *cf. Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *United States* v. *Masonite Corp.*, 316 U.S. 265, 275-76 (1942).

In reviewing ostensibly vertical restrictions, courts have been—and should be—alert to determine whether the dealers possess and have concertedly exercised such economic leverage over the manufacturer that they have been able to force the manufacturer to acquiesce in a horizontal combination that benefits the dealers *at the expense of the manufacturer and the consumer*. Obviously, that is less likely to be the case with restrictions on the scope or focus of dealer sales efforts, which clearly serve the manufacturer's and consumers' interest in effective distribution, than with, *e.g.*, minimum resale price maintenance programs, which plainly disserve the interests of many if not most consumers.[74]

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[73] *See, e.g.*, Posner, *supra* note 1, at 283, 287, 298-99.

[74] *See* note 1 *supra*. The possibility that apparently vertical resale price maintenance programs in fact stem from a combination among dealers may well have been a factor in the Court's consistently strong stand against minimum resale price maintenance under the Sherman Act. *See Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 407 (1911) ("[T]he advantage of established

We want to underscore that the mandate for a rule-of-reason approach to vertical marketing restraints is so clear that it exists independently of the manufacturers' size, market share or market power.[75] A manufacturer, with or without market power, has no interest in promoting monopoly profits for his dealers. Even if the manufacturer were a monopolist, its interests would be harmed, rather than helped, by the creation of a second monopoly at the dealer level.[76] As noted in Part I above, manufacturers may be presumed to select the most efficient, least costly means of distribution, for it is in their economic interest to do so. That is as true of a monopolist as of the smallest manufacturer.[77] In any event, these are issues the Court need not reach here.

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retail prices primarily concerns the dealers"); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 157-63 (1968) (Harlan, J., dissenting).

As Mr. Justice Brennan observed in *White Motor Co.* v. *United States*, 372 U.S. 253, 268 (1963), resale price maintenance also may "reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." (Emphasis in original.) Locational restrictions have no such effect.

[75] *See, e.g.*, Baker, *supra* note 68, at 545.

[76] "The difference between the price at which the manufacturer sells to the dealer and the dealer's price to the consumer is the manufacturer's cost of distribution, and any seller (even a monopolist) wants to minimize his costs." Posner, *supra* note 1, at 283. "There is reason to think that private firms have the incentive to minimize costs and to organize so as to avoid market failure so far as resource utilization is concerned, even when they possess monopoly power." Phillips, *supra* note 3, at 578.

[77] Indeed, since the primary (though improbable) anticompetitive danger is that ostensibly vertical restrictions may occasionally turn out to be horizontal restraints instigated by dealers and forced by them on the manufacturer, there is probably *less* necessity for antitrust scrutiny of marketing restrictions imposed by large and powerful manufacturers. Such manufacturers are less likely to be at the mercy of their dealers than weak or new manufacturers whose very existence depends on enticing a sufficient number of dealers to carry their goods.

Rather, vertical restrictions by a manufacturer on the scope or focus of its dealers' marketing efforts should be analyzed under the rule of reason—as such restrictions always were before *Schwinn*. Whether any decisive importance one way or the other should attach to the manufacturer's size, market share, or other single "talismanic" consideration will vary and will show itself soon enough in evaluating the reasonableness of some particular restraint in the particular distribution system in which it is used.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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